STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-725

March 26, 1999

PUBLIC UTILITIES COMMISSION
Rulemaking: Selection of Preferred Telecommunications Carriers and the Imposition of Preferred Carrier Freezes (Chapter 296)

NOTICE OF RULEMAKING

WELCH, Chairman; Diamond and NUGENT, Commissioners

I. INTRODUCTION

In this Notice, we open a rulemaking to prohibit telecommunications carriers from changing a customer's preferred carrier without first receiving the customer's authorization. This practice is commonly referred to as "slamming." The rule requires new telecommunications carriers to whom service is being switched to verify the customer's authorization to change carriers, prescribes methods for such authorization, and prescribes penalties for carriers that violate the rule. The rule also establishes requirements for imposing and lifting a preferred carrier freeze.

II. BACKGROUND

Title 35-A, section 7106 requires the Commission to adopt nondiscriminatory and competitively-neutral rules to address the problem of slamming. The Commission previously drafted and released a slamming rule for comment on September 25, 1998. A public hearing was held on October 30, 1998, and written comments on the draft rule were accepted until November 13, 1998. During this same time period, the Federal Communications Commission (FCC) was also in the process of drafting its own rule to address slamming. Prior to our rule being finalized, the FCC adopted its rule on December 17, 1998. The FCC also released a Second Further Notice of Proposed Rulemaking on December 23, 1998, further addressing the issue of slamming.[1]

Title 35-A M.R.S.A. section 7106(3)(A) requires that any rules adopted by the Commission be consistent with the rules adopted by the Federal Communications Commission. For this reason, we have revised our proposed rule to be consistent with the FCC rule. Although the text of our rule in its entirety may not necessarily reflect the text of the FCC rule verbatim, each section of our rule is substantively consistent with the FCC rule. Because the revised rule is significantly different from the rule we

[1] In the Matter of Implementation of the Subscriber Selection Changes Provisions of the Telecommunications Act of 1996, Second Report and Order and Further Notice of Proposed Rulemaking, Docket No. 94-129 (F.C.C. Dec. 17, 1998).

originally proposed on September 25, 1998, we are releasing a new proposed rule for comment.

In developing this proposed rule, we were guided by the FCC rule on slamming, as well as the specific statutory provisions contained in 35-A M.R.S.A. § 7106. Because our rules must be consistent with the FCC's rules, we have not entirely restated the FCC's rationale for adopting the proposed rule.[2]

Pursuant to 35-A M.R.S.A. § 7106(3), the rules established in this proceeding are routine technical rules as defined in Title 5, chapter 375, subchapter II-A.

III. DISCUSSION OF INDIVIDUAL SECTIONS

A. Section 1: Definitions

Section 1 contains definitions of terms used throughout the rule. The definitions contained in this section are generally self-explanatory.

The definitions that require some explanation are "submitting carrier" and "executing carrier." A submitting carrier is any carrier that: 1) requests on behalf of a customer that a customer's telecommunication's carrier be changed; and 2) seeks to provide retail services to the end-user customer. A carrier may be treated as a "submitting carrier" if it is responsible for any unnecessary delays in the submission of carrier changes or for the submission of unauthorized carrier changes. An executing carrier is any carrier that effects a request that a customer's carrier be changed. A carrier may be treated as an executing carrier if it is responsible for any unnecessary delays in the execution of carrier changes or for the execution of unauthorized carrier changes.

The definition of a submitting carrier accounts for the shifting of roles that occurs when either a facilities-based local exchange carrier (LEC) or interexchange carrier (IXC) sells service to a switchless reseller, and the reseller in turn sells service to an end-user. This definition assigns responsibility for a preferred carrier change to the reseller, rather than its underlying facilities-based carrier. Either the reseller or the facilities-based carrier, however, may be treated as a "submitting carrier" if it is responsible for unreasonable delays in the submission of carrier change requests or if it is responsible for submitting unauthorized carrier change requests.

An "executing carrier" is the carrier who has actual physical responsibility for making a preferred carrier change. In situations where a competitive local exchange carrier (CLEC) reseller is forwarding a carrier change request on behalf of a subscriber to the underlying facilities-based LEC, the facilities-based LEC is responsible for the carrier change. However, either the reseller or the facilities-based carrier may be treated as an "executing carrier" if it is responsible for unreasonable delays in the

[2] See the FCC's December 17, 1998, Second Report and Order for detailed explanation of the FCC's rationale.

execution of carrier change requests or for the execution of unauthorized carrier changes.

Title 35-A M.R.S.A. section 7106(3)(C) requires the Commission to define actions that constitute the "initiation of a change of carrier" and actions that "do not constitute the initiation of a change of carrier" to clarify where the burden of documenting the customer's desire for a carrier change resides (e.g. with the customer's local exchange carrier that effectuates the carrier change or with the new telecommunications carrier who requests the carrier change). The definitions of a "submitting carrier" and of an "executing carrier" clearly establish responsibility for submitting and executing carrier changes, thereby eliminating the need for a separate definition of "initiation of a change of carrier."

B. Section 2: Freeze of Customers Preferred Carrier

Section 2 requires all telecommunications carriers that offer preferred carrier freezes to offer freezes on a nondiscriminatory basis to all customers, to provide separate and discrete freezes on each telecommunications service provided, and to verify customer requests to impose and lift such freezes.

We believe that it is in the customer's best interest to be able to freeze his or her preferred carrier selection to ensure that the selection is not changed unless the customer so desires. We also believe it is in the customer's best interest to be able to freeze individual telecommunication services. Allowing a customer to freeze individual services increases customer control over their telecommunications services and eliminates "account-level" freezes that can be anti-competitive in nature.

Section 2(A) requires that preferred carrier changes be offered to all customers in a nondiscriminatory manner. Carrier freezes offer consumers an additional and beneficial level of protection against slamming, but they also create the potential for unreasonable and anti-competitive behavior that may impede competition. Facilities-based LECs, most of which are incumbent LECs, are uniquely situated to administer preferred carrier freezes. Thus, other carriers that may be competing directly with the incumbent LECs must rely on the LEC to offer preferred carrier freezes to their customers. To ensure that freezes are administered in an equitable and competitively-neutral manner, we require that freezes be offered in a non-discriminatory manner to customers, regardless of the customer's preferred carrier selection .

Section 2(B) requires the carrier offering the freeze to obtain separate verifications for each service being frozen (e.g. local exchange service, intraLATA toll service, interstate toll service, etc.). This will increase customer choice in a competitive marketplace by allowing customers to establish preferred carrier freezes only on those service they choose to freeze. For instance, a customer may elect to freeze his or her selection for intraLATA toll, while retaining the option to change his or her interstate toll carrier. This will also prevent carriers from placing freezes on all of the customer's services when the customer only intended to authorize a freeze on a particular service.

Section 2(C) establishes standards for the solicitation of preferred carrier freezes. It is important for customers to fully understand the nature of the carrier freeze, including how to lift a freeze if desired. It is also important for customers to fully understand the nature of the preferred carrier freeze to prevent anti-competitive use of freezes by carriers. We therefore require any carrier-provided information regarding preferred carrier freezes to be neutral, clear and not misleading. This should reduce customer confusion regarding the imposition of preferred carrier freezes and reduce the instances of fraud. Customers will be aware of which services the carrier freeze pertains before the customer takes affirmative action to impose such a freeze.

Section 2(D) requires that carrier change verification procedures be used to verify a customer's desire to impose a preferred carrier freeze. By requiring facilities-based LECs that administer preferred carrier freezes to verify a customer's request to place a freeze, we expect to reduce customer confusion regarding preferred carrier freezes and to prevent fraud in their implementation. This will also minimize the risk that unscrupulous carriers might attempt to impose preferred carrier freezes without the consent of customers.

Section 2(E) requires carriers effectuating preferred carrier freezes to verify a customer's desire to lift a preferred carrier freeze. As previously stated, it is important for customers to be able to freeze their preferred carrier selection to ensure that the selection is not changed unless the customer so desires. However, it is also important for customers to be able to easily remove the preferred carrier freeze to take advantage of competitive local exchange and interexchange markets. Because the facilities-based LEC controls the preferred carrier freeze, responsibility for documenting a customer's desire to lift a preferred carrier freeze resides with the facilities-based LEC.

C. Section 3: Changing a Primary Interexchange or Local Exchange Carrier

Section 3(A) prohibits submitting carriers from initiating a change in a customer's preferred carrier without obtaining proper authorization for the change from the customer.

Section 3(B) prohibits a submitting carrier from submitting a preferred carrier change request to a LEC unless the request is verified through a Letter of Agency (LOA), an electronic authorization placed from the telephone number(s) on which the preferred carrier selection is to be changed, an independent third party, or other FCC approved method. The verification methods established in this subsection mirror the verification methods contained in 35-A M.R.S.A. § 7106(1)(A).

Section 3(C) specifies that executing carriers shall not verify carrier changes prior to executing the change. It would be burdensome, unnecessary, and duplicative for executing carriers to verify preferred carrier changes. In addition, in situations where the carrier change results in a customer leaving the executing carrier for a

competitive carrier, an incentive exists for the executing carrier to reject the carrier change authorization. To prevent anti-competitive behavior, this rule prohibits executing carriers from verifying carrier changes. Although executing carriers do not have verification responsibilities under our rules, they do have a responsibility to ensure that carrier changes are executed promptly and without unreasonable delay.

Section 3(D) requires all changes to a customer's preferred carrier, including local exchange, intraLATA toll, and interLATA toll services, be authorized by the customer and verified in accordance with our procedures. This will allow customers to change only those services they desire and will prevent carriers from taking advantage of customer confusion and changing all the preferred carriers where the customer merely intended to change one.

Section 3(E) requires submitting carriers to document a customer's preferred carrier selection change request made over the telephone pursuant to one of the methods required for carrier-initiated preferred carrier selection changes. Title 35-A M.R.S.A. section 7106(3)(B) requires the Commission to consider whether customer verification is necessary in the case of customer-initiated calls. This draft rule reflects our belief that customer verification is necessary to prevent slamming in those instances where a carrier initiates an unauthorized change and simply claims that the customer requested the switch over the phone.

D. Section 4: Liability for an Unauthorized Change

The purpose of this section is to ensure that customers do not pay or incur any additional costs as a result of being slammed, and that carriers involved do not benefit financially from a slamming incident.

Section 4 assigns liability for unauthorized changes in a customer's preferred carrier selection. Submitting carriers who initiate an unauthorized change or executing carriers who fail to effectuate an authorized change are liable to the authorized carrier in an amount equal to charges paid to the unauthorized carrier by the customer. The unauthorized carrier is also liable to the customer for any costs the customer incurs to return to the authorized carrier. Customers who do not pay charges to an unauthorized carrier are absolved of liability for charges assessed by an unauthorized carrier for the first 30 days after the slam occurred. After the 30-day absolution period, customers are liable to the authorized carrier for charges they would have incurred if they had remained with the authorized carrier. Customers who pay charges to an unauthorized carrier are liable only for the charges they would have paid their authorized carrier absent the unauthorized change.

Title 35-A M.R.S.A. section 7106(3)(D) states that if the FCC provides by rule that customers are not responsible to any carrier (authorized or unauthorized) for usage during the period the customer was served by the unauthorized interstate carrier, the Commission may promulgate a similar rule for local and intrastate carriers. The FCC rule adopted on December 17, 1998, absolves customers of liability for unpaid charges

assessed by unauthorized carriers for 30 days after an unauthorized change has occurred. If a customer pays charges to an unauthorized carrier, however, the customer's liability will be limited to the amount he or she would have paid the authorized carrier. The rule we propose here is consistent with the FCC's approach.

The reason the FCC absolves customers who have not paid charges to the unauthorized carrier, but does not absolve from liability customers who have paid charges to the unauthorized carrier, is that section 258(b) of the federal Telecommunications Act of 1996 (TelAct) requires unauthorized carriers to give authorized carriers all charges collected from slammed customers. The TelAct did not address whether customers must pay unpaid charges assessed by an unauthorized carrier to the properly authorized carrier, or whether charges collected from the unauthorized carrier should be returned to the customer who was slammed. The FCC believes that this policy strikes a balance between the interests of consumers and compliance with the TelAct.[3] We do not fully agree with this position.[4]

E. Section 5: Reimbursement Procedures

Section 5 establishes the procedures that unauthorized carriers must follow in reimbursing authorized carriers, as well as customers.

For instances where the customer has not paid charges to an unauthorized carrier, section 5 requires an unauthorized carrier to remove from the customer's bill all charges that were incurred for the first 30 days after the unauthorized change occurred. The alleged unauthorized carrier shall, at the request of the authorized carrier, submit proof of verification of the disputed carrier change, billing records, and a claim for the amount of the charges absolved (if the unauthorized carrier decides to challenge the slamming accusation). This will allow the accused unauthorized carrier the opportunity to refute the slamming accusation and provide evidence to document a proper change of carrier.

The authorized carrier shall conduct a reasonable and neutral investigation of the claim and issue a decision to the alleged unauthorized carrier and customer within 60 days after the receipt of the claim. If the authorized carrier decides that the customer did authorize the carrier change, it shall place on the customer's bill a charge equal to the amount of charges from which the customer had previously been absolved, and forward that amount to the alleged unauthorized carrier. If the authorized carrier

[3] In the Matter of Implementation of the Subscriber Selection Changes Provisions of the Telecommunications Act of 1996, Second Report and Order and Further Notice of Proposed Rulemaking, Docket No. 94-129 (F.C.C. Dec. 17, 1998).

[4] We believe that all customers who are slammed should be absolved of liability for at least 30 days after the occurrence of the unauthorized change. However, absolving customers who have paid charges to the unauthorized carrier would be inconsistent with the FCC rule, and is therefore prohibited by Title 35-A, section 7106 (3)(A).

determines that the customer was slammed, the customer shall not be required to make any payments for charges for which he or she was previously absolved.

For instances where the customer has paid charges to the unauthorized carrier, the unauthorized carrier shall provide proof of verification for the carrier change to the authorized carrier. In the absence of such proof, the unauthorized carrier must provide to the authorized carrier an amount equal to all charges paid by the customer, an amount equal to all charges to return the customer to his or her authorized carrier, and copies of any telephone bills issued to the customer. Upon receipt of these funds by the authorized carrier, the authorized carrier shall provide a refund to the customer for all charges paid in excess of what the authorized carrier would have charged the customer, absent the unauthorized change. In situations where the unauthorized carrier fails to provide proof of verification and fails to forward charges paid by the customer to the authorized carrier, the authorized carrier is not required to reimburse the customer.

Section 5 also requires the authorized carrier to reinstate the customer in any premium program in which the customer was enrolled prior to the unauthorized change, if that customer's participation in the premium program was terminated because of the unauthorized change. The authorized carrier shall also provide or restore to the customer any premiums to which the customer would have been entitled had the unauthorized change not occurred. The authorized carrier must comply with this requirement regardless of whether it is able to recover from the unauthorized carrier any charges that were paid by the customer.

The purpose of this section is to ensure that customers do not pay more for services because of the unauthorized change of carriers than they would have been charged had the unauthorized change not occurred. Customers who are slammed often are charged at a higher rate by an unauthorized carrier for services than they would have been charged by their authorized carrier and may lose premium services due to the unauthorized change. It is important to hold a customer responsible for only the cost of services they would have been responsible for had the unauthorized change not occurred and to ensure that their costs for service remain at what they would have been absent the unauthorized change.

F. Section 6: Consistency with Federal Communications Commission Rule.

Title 35-A M.R.S.A. section 7106(3)(A) requires that rules adopted by the Commission be consistent with rules adopted by the FCC, except that the Commission's rules on customer verification need not include the customer information package as defined in 47 Code of Federal Regulations, Section 64.1100(d).

As stated earlier, our proposed draft rule incorporates the FCC's rule which was adopted on December 17, 1998. However, the FCC also issued a Second Further Notice of Proposed Rulemaking on December 23, 1998. To ensure that our rule will be

consistent with any revisions the FCC may incorporate, section 6 states "in the event the FCC promulgates a rule that is inconsistent with certain provisions of this rule, the FCC rule will govern for those provisions."

G. Section 7: Penalty

Section 7 provides that the Commission may impose an administrative penalty against any person, corporation, or entity that violates this rule and establishes maximum penalty amounts and guidelines for determining penalty amounts. This section mirrors the language contained in 35-A M.R.S.A. § 7106(2).

V. FISCAL AND ECONOMIC EFFECTS

In accordance with 5 M.R.S.A. § 8057-A(1), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested parties to comment on the fiscal impact and all other implications of this rule.

VI. RULEMAKING PROCEDURES

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. A public hearing on this matter was previously held on October 30, 1998, at the Maine Public Utilities Commission in Augusta. Because of the minimal interest and attendance at the public hearing, we will not conduct a second public hearing to discuss this revised rule, unless requested by five (5) or more interested persons.

Written comments to the rule may be filed with the Administrative Director no later than May 14, 1999. Please refer to Docket Number 98-725 when submitting comments.

The Administrative Director shall send copies of this Order and the attached rule to:

1. All telecommunications carriers certified to operate in the State of Maine;

2. All persons who have filed with the Commission within the past year a written request for copies of all Notices of Rulemaking;

3. The Office of the Public Advocate;

4. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and

5. Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

Accordingly, we

O R D E R

1. That the Administrative Director send copies of this Order and the attached rule to all the persons listed above and compile a service list of all such persons and any persons submitting written comments on the proposed rule.

2. That the record from the first rulemaking be incorporated into this rulemaking.

3. That the Public Information Coordinator shall post a copy of this Order on the Commission's World Wide Web page (http://www.state.me.us/mpuc/).

Dated at Augusta, Maine this 26th day of March, 1999.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond